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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

Jeffrey E. Dahl,

Debtor.

Case No.: 2:11-bk-11028-NB

CHAPTER 13

**MEMORANDUM DECISION REGARDING
ASSIGNMENT OF DEED OF TRUST BY
“MERS”**

Date: December 4, 2012

Time: 10:00 a.m.

Courtroom: 1545

The above-captioned debtor (“Debtor”) argues that the interests under a standard form of deed of trust (“DOT”) cannot be assigned by the named beneficiary, the Mortgage Electronic Registration Systems, Inc. (“MERS”). I disagree.

I. BACKGROUND

On November 8, 2012 a motion for relief from the automatic stay (dkt. 66) (the “Motion”) was filed by Wells Fargo Bank, N.A. Successor by Merger to Wells Fargo Bank Minnesota, N.A., f/k/a Norwest Bank Minnesota, N.A. Solely as Trustee for Structured Asset Mortgage Investments II Inc., Greenpoint MTA Trust 2005-AR2 Mortgage Pass-Through Certificates, Series 2005-AR2 (“Movant”). On November 20,

2012 Debtor filed his Opposition (dkt. 70).

The Motion papers include an Assignment of Deed of Trust by which MERS assigned all beneficial interest under the DOT to Movant's predecessor in interest. That entity later assigned its interest to Movant.

The Motion came on for hearing at the above-captioned date and time. Appearances are as noted in the record. A number of matters were addressed at the hearing, but the sole issue addressed in this Memorandum Decision is whether MERS had the capacity to assign the DOT.¹

II. DISCUSSION

Debtor argues that MERS could not assign the DOT and therefore Movant lacks standing and is not the real party in interest. See Fed. R. Civ. P. 17(a) (real party in interest requirement, made applicable by Fed. R. Bankr. P. 7017 and 9114(c)). Debtor's arguments are not persuasive.

A. Under the Plain Meaning of the DOT, MERS has Authority to Assign the DOT.

The DOT in this case is a standard form that names MERS as the beneficiary, as nominee for a named Lender and its successors and assigns. See DOT (Motion, dkt. 66, Ex. 2) at 1, Definition "(E)". The pledging paragraphs of the DOT include the following statement:

Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not

¹ Movant has not shown that to date it has received any transfer of the promissory note associated with the DOT. But that is irrelevant because "under California's statutory scheme, the original note need not be produced to initiate a valid nonjudicial foreclosure" (*Debrunner v. Deutsche Bank Nat. Trust Co.*, 204 Cal.App.4th 433, 442 (2012) (emphasis added)) and a creditor who can initiate a foreclosure can certainly take the lesser step of seeking relief from the automatic stay to do so. See also *In re Veal*, 450 B.R. 897, 915-18 & n. 34 (9th Cir. BAP 2011) (distinguishing California law from traditional common law on this issue). That is not to say that a creditor can complete nonjudicial foreclosure without the promissory note, but it can at least start the process. Compare, e.g., *Cockerell v. Title Ins. & Trust Co.*, 42 Cal.2d 284, 291 (1954) (summarizing authority that deed of trust "...could only be foreclosed by the owner of the note") (emphasis added, citation omitted).

1 limited to, releasing and canceling this Security Instrument. [*Id.* at 3,
2 emphasis added.]

3 It is “necessary” (in the words of the DOT) for MERS to assign the DOT because
4 it is the named beneficiary. (Of course, the Lender can always take control back from
5 its nominee and elect to do the assignment itself, but that is not what happened in this
6 case, and unless and until the Lender chooses to do its own assignment or more
7 generally revoke MERS’ status as its nominee, MERS must do the assignment because
8 it is the named beneficiary.) Therefore the plain meaning of the emphasized language
9 gives MERS the authority to assign the DOT.

10 **B. The Vast Majority of Cases Support the Foregoing Analysis.**

11 It is true that the debtor’s argument is supported by at least one case. See *In re*
12 *Weisband*, 427 B.R. 13, 20 (Bankr. D. Ariz. 2010) (holding that MERS lacks authority to
13 assign the DOT or any other documents under standard language). But the vast
14 majority of cases accept that MERS can assign the DOT. See, e.g., *In re Fontes*, 2011
15 WL 3300933 at *4 (9th Cir. BAP) (unpublished) (holding that “the deed of trust gave
16 MERS, as nominee, the *power to assign the deed of trust*,” although not the power to
17 assign the promissory note). See also *Tilley v. Ampro Mortgage*, 2012 WL 33033, at *3
18 (E.D. Cal. 2012) (“courts have found that whatever the role a nominee may play when
19 ‘necessary to comply with law and custom’ [the standard language of the DOT], MERS
20 acts as the agent of the lender and may assign a beneficial interest in the deed of trust,
21 assign the note, and appoint a substitute trustee.”) (citing *Fontenot v. Wells Fargo*
22 *Bank,N.A.*, 198 Cal.App.4th 256, 270-271 (2011)).

23 **C. If There is Any Ambiguity in the DOT, it Should Be Resolved in Favor**
24 **of Facilitating the Purpose of MERS: to Delegate Assignments to**
25 **MERS.**

26 As noted in an earlier case:

27 the reason for designating MERS as a nominee for lenders is so that
28 many DOTs can be pooled, securitized, fractionalized, and traded via
MERS’ internal records without having to incur the burdens and risks
associated with attempting to record each transfer of every DOT interest
with the applicable county recorder’s office. See, e.g., *In re Weisband*,
427 B.R. 13, at 20 n.6 (Bankr. D. Ariz. 2010). That delegation to MERS

undoubtedly has its drawbacks (among other things, county recorders complain that they receive fewer fees, and both borrowers and loan servicers complain that securitization can make it difficult to determine who has authority to negotiate any departure from strict enforcement of the loan documents). But borrowers like [the debtor] may benefit at the inception of the loan from reduced transaction costs and an easier flow of capital. [*In re Gallagher*, 2012 WL 2900477 at *4, emphasis added]

In any event, regardless whether the debtor in this case actually did benefit or whether MERS is a good or a bad thing from a societal perspective, the fact remains that lenders choose to participate in the MERS system precisely in order to delegate to MERS the transfers of DOTs. In keeping with that purpose, the DOT should be interpreted as authorizing MERS to assign the DOT in the real estate records as well as within MERS' internal records.

D. Policy Reasons Support the Foregoing Interpretation of the DOT

If the Court were to interpret the DOT in a way that deprived MERS of the power to effectuate assignments then that likely would be very disruptive to the system that the lenders and MERS have sought to establish. Among other disruptions, MERS is the principal record-keeper, and the lenders themselves may lack the necessary records. In addition, lenders often transfer the beneficial ownership to other lenders, or as part of securitization, or they may merge or go out of business, and there may be no paper trail of assignments other than through MERS. Therefore, as a practical matter, MERS may be the only entity capable of doing the assignment. For all of these reasons, in the words of the DOT, it is "necessary to comply with law or custom" that MERS be able to execute assignments of the DOT. DOT (Motion, dkt. 66, Ex. 2) at 3.

E. Alternatively, if MERS Somehow Lacked Actual Authority to Assign the DOTs, it has Apparent Authority, Which is Sufficient in the Circumstances.

Alternatively, supposing for the sake of discussion that despite all appearances MERS were to lack authority to assign the DOT, the lenders who participate in the MERS system have vested MERS with apparent or ostensible authority. *See generally* Cal. Civ. Code § 2334; Restatement (Third) of Agency § 6.11(2) (2006); *see, e.g.,*

1 *Snukal v. Flightways Mfg., Inc.*, 23 Cal.4th 754, 779 (2000) (past acquiescence can
2 establish ostensible authority). Therefore under hornbook agency law the risk is on
3 lenders, not borrowers, if MERS were to assign the DOT to the wrong person. *Id.*

4 That is important because “the concern of real party in interest jurisprudence for
5 avoiding double payment is quite reduced.” *Veal*, 450 B.R. at 914. Put differently,
6 Debtor has not established any prejudice if this Court accepts an assignment executed
7 by MERS, at least for purposes of granting relief from the automatic stay, which simply
8 permits the parties to pursue whatever claims and defenses they may have under
9 nonbankruptcy law.

10 **IV. CONCLUSION**

11 For all of the foregoing reasons, Movant has met its *prima facie* burden to show it
12 has standing and is the real party in interest entitled to enforce the DOT. Debtor has
13 not overcome that *prima facie* showing.

14 ###

26 DATED: December 28, 2012

25 
United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): MEMORANDUM DECISION REGARDING ASSIGNMENT OF DEED OF TRUST BY "MERS" was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF) – Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of 12/17/12, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

Kathy A Dockery (TR) efiling@CH13LA.com
Timothy L McCandless tmlawbksb@hotmail.com
Gilbert R Yabes ecfcacb@piteduncan.com

☐ Service information continued on attached page

2. SERVED BY THE COURT VIA UNITED STATES MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Jeffrey E. Dahl
3719 California Ave
Long Beach, CA 90807

☐ Service information continued on attached page

3. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

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